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87-1015

No. 87-

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES F. MONAHAN, RICHARD DUDLEY, JEFFREY ROSS, CHESTER BABINEAU, EILEEN DUMOUCHEL, ANTHONY LAMONICA, MORRIS LEDERMAN, JOHN STALLWORTH, and ROMULUS DENICOLA,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JAMES M. SHANNON
ATTORNEY GENERAL
Commonwealth of Massachusetts

William L. Pardee*
Steven H. Goldberg
Thomas A. Barnico
Assistant Attorneys General
One Ashburton Place, Room 2019
Boston, Massachusetts 02108-1698
(617) 727-1001

* Counsel of Record

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EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1392

FEDERAL TRADE COMMISSION,

Petitioner, Appellee,

v.

CHARLES F. MONAHAN, ET AL.,

Respondents, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. William G. Young.
U.S. District Judge]

Before

Breyer and Selya, Circuit Judges,
and Lageux,*/ District Judge.

November 4, 1987

BREYER, Circuit Judge. In August 1985, the Federal Trade Commission

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*/ Of the District of Rhode Island, sitting by designation.

("FTC") told the Massachusetts Board of Registration in Pharmacy ("the Board") that it would investigate three Board rules to see whether these rules unreasonably restrained competition and hurt consumers. The first rule essentially prohibited advertising in which one pharmacist claimed superiority to (or disparaged) another; the second rule prohibited mail order pharmacies; and the third rule prevent pharmacies from establishing "branch offices" or "pick-up stations", say, at work places, where patients could drop off, and pick up, prescriptions that the "main office" (in the interim) would fill in batches. See Mass. Regs. Code tit. 247, §§ 7.00(7), (14), (26) (1979), subsequently amended, Feb. 6, 1987. (See Appendix.)

The FTC asked the Board to cooperate with the investigation. The Board

refused to do so. The FTC then issued subpoenas, which the Board resisted, and which the FTC eventually asked the district court to enforce. See 15 U.S.C. § 49 (1982). The distrit court ordered the subpoenas enforced, and the Board now appeals that enforcement order. We believe the order is legally proper.

The Board concedes that the FTC has broad legal power to issue investigative subpoenas. See United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (subpoenas should be enforced if the inquiry is "within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant"); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 214 (1946) ("Congress has authorized the Administrator, rather than the district courts in the

first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations"); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943) (subpoenas enforceable unless "plainly incompetent or irrelevant to any lawful purpose"). But the Board says that the FTC has no "lawful purpose" in investigating its potential antitrust violations because, as a state regulatory agency, it is "immune" from the antitrust laws. See Hallie v. Eau Claire, 471 U.S. 34 (1985); Hoover v. Ronwin, 466 U.S. 558 (1984); Parker v. Brown, 317 U.S. 341 (1943). The Board seems to take the view that this immunity protects its original regulations from investigation no matter how harmful to competition or to consumers they may turn out to be. This, however, is not so.

For one thing, a subordinate state governmental unit enjoys antitrust "immunity" only when it acts pursuant to a "clearly articulated and affirmatively expressed" state policy. Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Interface Group, Inc. v. Massachusetts Port Authority, 618 F.2d 9, 13 (1st Cir. 1987) (hereinafter "Massport"). The Board is a subordinate governmental unit. See Hoover, 466 U.S. at 568 (indicating that for immunity purposes, a state agency is equivalent to a municipality, not the legislature itself); Massport, 816 F.2d at 13. But we can find no "clearly articulated and affirmatively expressed" state policy that guarantees the Board its protection. Of course, the state has authorized the Board to regulate pharmacy advertising, branching, and other such practices. See

Mass. Gen. Laws ch. 13, §§ 22-25 (1984); Mass. Gen. Laws ch. 94C, §§ 1-31 (1984); Mass. Gen. Laws ch. 112, §§ 24-42A, 61-65 (1984). But we do not know for sure that this is all that the Board is doing. The state statutes do not permit the Board, under the guise of regulation, and without legitimate purpose, simply to raise consumer prices or to inconvenience workers by making them travel farther for prescriptions. Cf. United States v. Texas State Board of Public Accountancy, 464 F. Supp. 490 (W.D. Tex. 1978), aff'd with minor modifications per curiam, 592 F.2d 919 (5th Cir.), cert. denied, 444 U.S. 925 (1979). But cf. First American Title Co. v. South Dakota Land Title Association, 714 F.2d 1439 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984). Did the Board do so here? Has it engaged in other unreason-

able activities? Were its activities justified by legitimate regulatory purposes? Even if they were not, were those activities so closely related to legitimate agency activities as to warrant immunity? We cannot answer these questions until we know more precisely what those activities are. We, like the FTC, must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of a "clearly articulated and affirmatively expressed" state policy.

For another thing, where "state regulation by a private party is involved," and where there is a "gauzy cloak of state involvement over what is essentially a private" anticompetitive activity, California Retail Liquor Dealers Associa-

tion v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980), the state, in order to obtain antitrust immunity, "must supervise actively" the activity in question. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 57 (1985). Whether any "anticompetitive" Board activities are "essentially" those of private parties depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists. See Mass. Gen. Laws ch. 13, § 22 (1984). Again, we cannot now say, without knowing more facts, whether or not this additional "state supervision" condition will apply.

The Board points out that in Massport, 816 F.2d at 10-13, we looked only at an antitrust complaint and found that Massport, a state agency, was "immune"

from the plaintiff's antitrust attack. We wrote there that the complaint's factual statements, which the plaintiff said revealed "exclusive dealing," also revealed activities that directly implemented "policies that govern which airlines are to use which terminals, where and how they are to be serviced, and whether or when they can taxi from one terminal to another," all activities which lie "close to the heart of Massport's basic purpose." Massport, 816 F.2d at 13.

Massport, however, is clearly distinguishable. Because Massport was not a subpoena enforcement case, we could look at the complaint and directly compare the claimed activities with Massport's authorizing legislation. Moreover, in Massport we could not conceive how the activities attacked could fall outisde

the area of immunity delineated by clear state policy; in this case, as our previous discussion suggests, that is not so. Rather, here we do not know whether the Board's activities will turn out to lie "close to," or far from, the state statutes' basic purpose; nor do we know whether they will turn out to fall inside or "outside that area of [agency] autonomy involving '"ordinary" [agency] errors or abuses in the administration of powers conferred by the state.'" Massport, 816 F.2d at 13-14, quoting Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985) (quoting Areeda, "Antitrust Immunity for 'State Action' after Lafayette", 95 Harv. L. Rev. 435, 453 (1981)). All depends upon precisely what conduct turns out to be at issue, its harms, its justi-

fications, and its relation to the agency's basic statutory mission.

This factual uncertainty is precisely why this "sort of dispute" ought not to be

> settled in a subpoena enforcement proceeding. An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction. These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission's regulatory jurisdictions over appellants may be clouded but it is not plainly spurious.

Federal Trade Commission v. Swanson, 560 F.2d 1, 2 (1st Cir. 1977) (citations omitted).

The judgment of the district court is Affirmed.

APPENDIX

The original and amended versions of the three regulations at issue are as follows:

Original Versions

247 CMR 7.00(7) - "A pharmacist or pharmacy shall not, by advertising or otherwise, claim any professional superiority in the dispensing of devices or drugs; nor shall a pharmacist or pharmacy advertise services or products in a manner that disparages the ability, character or integrity of other pharmacists."

247 CMR 7.00(14) - "A pharmacist or pharmacy shall not participate in any mail order business, or in any plan, agreement or arrangement that adversely

affects the pharmacist-patient-practitioner relationship."

247 CMR 7.00(26) - "(a) A pharmacy, or anyone acting in behalf of said pharmacy, shall not enter into any scheme, arrangement or agreement for collecting, by itself or other persons, prescriptions at industrial plants, places or [sic] business, or any other sites where specific groups of people are regularly employed or affiliated. (b) A pharmacy, or anyone acting in behalf of said pharmacy, shall not fill any prescriptions which have been collected through solicitation, by itself or others, at industrial plants, places of business, or any other sites where specific groups of people are regularly employed or affiliated, and which prescriptions have been, di-

rectly or indirectly, batch-delivered to said pharmacy. (c) The provisions set forth in 247 CMR 7.00(26)(a) and 7.00(26)(b) shall not apply to prescriptions which have been issued to patients who are being treated within a licensed extended care facility or within a licensed hospital facility, whenever such prescriptions have been collected by the pharmacy itself or delivered to said pharmacy by an authorized agent of said patients."

Mass. Regs. Code ch. 247, §§ 7.00(7), 7.00(14), 7.00(26) (1979).

New Versions

247 CMR 7.00(7) - "A pharmacist shall not utilize advertising which makes

claims of professional superiority that he or she cannot substantiate."

247 CMR 7.00(14) - "No pharmacist or pharmacy shall engage in the sale of controlled substances through the mail or by common carrier. Notwithstanding the foregoing, a pharmacist or pharmacy may dispense prescription drugs by mail or common carrier, in a manner consistent with federal law and U.S. postal regulations, to any customer on a temporary basis in the event such customer is unable to present himself or herself at the dispensing pharmacy due to illness, injury or absence, provided that the dispensing pharmacist or pharmacy shall in each such case have available sufficient information to contact such customer and the prescribing physician."

247 CMR 7.00(26) - "(a) No pharmacy, or anyone acting in behalf of a pharmacy, shall collect prescriptions at industrial plants, places of business, or any other site where specific groups of people are regularly employed or affiliated unless the precriptions are collected in person by a pharmacist or other pharmacy employee and then are distributed to the patient or an authorized agent of the patient by a pharmacist. (b) The provisions set forth in 247 CMR 7.00(26)(a) shall not apply to prescriptions which have been issued to patients who are being treated within a licensed extended care facility or within a licensed hospital facility, whenever such prescriptions have been collected by the pharmacy itself or delivered to said pharmacy by an authorized agent of said patients."

Mass. Regs. Code ch. 247 §§ 7.00(7), 7.00(14), 7.00(26) (1987).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FEDERAL TRADE COMMISSION, Petitioner,	)	
v.	)	MBD No. 86-848-Y
CHARLES F. MONAHAN, et al., Respondents.	)	

MEMORANDUM AND ORDER

YOUNG, D.J. April 13, 1987

This is a summary proceeding filed by the Federal Trade Commission (the "Commission") pursuant to Section 9 of the Federal Trade Commission Act ("Act"), 15 U.S.C. § 49, seeking the enforcement of nine Commission subpoenas issued on May 15, 1986.

In August, 1985, the Commission began conducting an investigation to determine whether certain regulations enacted by the Massachusetts Board of Registration in Pharmacy (the "Board") constituted

unfair methods of competiton in violation of Section 5 of the Act. Initially the Board provided the Commission with the documents requested by the Commission in its investigation. In December, 1985, however, the Board informed the Commission that it would no longer voluntarily cooperate in the Commission's investigation. On May 15, 1986, the Commission issued nine investigative subpoenas directed to various Board members.

On June 12, 1986, the Board filed a petition to quash the subpoenas, raising three arguments in an effort to halt the Commission's further investigation. First, the Board claimed immunity from scrutiny under the federal anti-trust laws pursuant to the theory that its conduct was state action. Second, the Board claimed that the Commission, in conduct-

ing its investigation, was unconstitutionally exercising executive powers as an agent of the legislative branch of the government. Third, the Board argued that, as matter of discretion, since similar jurisdictional issues are under advisement before the full Commission in an investigation of a sister state agency (the Massachusetts Board of Optometry), any decision in this case should be delayed pending the ruling of the full Commission in that case.

On July 15, 1985, an FTC Commissioner denied the Board's petition to quash. On July 21, 1985, the Board appealed this ruling to the full Commission, which denied the request because it agreed with the Commissioner's ruling and no new issues of merit were raised regarding the quashing of the subpoenas. The Board

then advised the Commission that it would not comply with the subpoenas voluntarily, and the Commission brought the present action before the Court.

I.

The Board argues that it is immune from investigation by the Commission on the theory that its conduct is state action and thus beyond the reach of the Act. The Board relies primarily upon the Supreme Court's construction of the Sherman Act in Parker v. Brown, 317 U.S. 341 (1943). In Parker, the Supreme Court held that the Sherman Act does not apply to actions taken by the state as a sovereign. Thus, actions taken by the State of California to protect the raisin industry were not in violation of the Sherman Act.

> It derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command.

Id. at 350. The Supreme Court has expressly rejected, however, the argument that all state agencies are protected from the reach of the anti-trust laws by Parker.

> Plainly petitioners are in error in arguing that Parker held that all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from antitrust laws.

City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 408 (1978). In a case cited frequently in Lafayette, the Supreme Court emphasized again that to be protected by state action immunity an action must be compelled by the state acting as sovereign.

> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anti-competitive activities for the benefit of its members.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975)(footnote omitted).

In addition, the Court of Appeals for the First Circuit has indicated strongly that, absent any express statutory pronibitions, subpoenas such as those involved in this proceeding, ought be promptly enforced.

> An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction.... These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission's regulatory jurisdiction over appellants may be clouded but it is not plainly suprious.

Federal Trade Commission v. Swanson, 560 F.2d 1, 2 (1977) (emphasis added) (inves-

tigation of tour operators as part of Federal Trade Commission's investigation of package tour industry).

As the Commission's assertion of jurisdiction here is not plainly supri-ous, its subpoenas ought be enforced.

II.

The Board also argues that the Commission, in conducting an investigation to prosecute possible violations of the Federal Trade Commission Act, is exercising executive powers and that this constitutes a violation of the separation of powers implicit in the Constitution of the United States. This argument is premature since the outcome of the investigation cannot presently be fore-

seen.[1/]

Finally, the Board also argues that enforcement of these subpoenas would be "inequitable" pending the resolution of similar issues raised in the case involving the sister state agency, In the Matter of the Massachusetts Board of Registration in Optometry, FTC Docket No. 9195. However, as the appeal process in that case could take up to three years to resolve and involves different statutes and statutory schemes, it would in

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1/ See also Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935):

> To the extent that it [the Federal Trade Commission] exercises functions -- as distinguished from executive power in the constitutional sense -- it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial department of the government.

fact be "inequitable" not to enforce these subpoenas.

For the reasons stated above, the Commission's petition for an Order by this Court compelling members of the Board to testify is ALLOWED.

SO ORDERED.

/s/
WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF THE SECRETARY July 15, 1986

William L. Pardee, Esq.
Assistant Attorney General
Government Bureau
1 Ashburton Place, Room 2019
Boston, MA 02108

RE: In the Matter of Investigation of the Massachusetts Board of Registration in Pharmacy; File No. 851-0145

Dear Mr. Pardee:

This is to advise you of the Federal Trade Commission's ruling on the petition to quash subpoenas that you filed on behalf of your clients, Charles F. Monahan, et al. (the board), in the above-captioned matter. The ruling set forth herein has been made by Commissioner Terry Calvani pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). This constitutes the Commission's response under Commission Rule of Practice 2.7(g). See 49 Fed. Reg. 6089

(Feb. 17, 1984).

For the reasons stated below, the petition to quash subpoenas is denied.

I. The Petition

The petition urges that the subpeonas be quashed for the following reasons: (1) the promulgation and enforcement of the board's regulations are sovereign acts of the Commonwealth and therefore immune to challenge under federal anti-trus laws (Pet. at p. 6); (2) in investigating the board's regulations, the Commission is exercising executive powers in violation of the United States Constitution (Pet. at p. 7); and (3) enforcement of the subpoenas should be stayed pending a final disposition of In the Matter of Massachusetts Board of Regis-

tration in Optometry, FTC No. 9195, because similar jurisdictional issues are raised therein (Pet. at pp. 8-9). We consider each contention in turn.

II. State Action Immunity

In Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court held that the Sherman Act does not apply to actions taken by the state as sovereign. The board argues that it is acting as the sovereign, and therefore entitled to Parker immunity, because it "has acted and is acting pursuant to an express delegation of authority by the Legislature

of the Commonwealth" (Pet. at p. 6).*/

In analyzing petitioners' state action argument, we first note that as a general matter, "an agency has jurisdiction to determine the scope of its authority, in the first instance, and that such matters will not be determined in a proceeding to enforce a subpoena." CAB v. Deutsche Lufthansa Aktiengesellschaft, 591 F.2d 951, 952 (D.C. Cir. 1979). Substantive defenses properly raised in an administrative proceeding are generally premature when raised in defense to compliance with a subpoena.

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*/ More specifically, the board alleges it is authorized to "make such rules and regulations as it deems necessary to enable it to properly enforce the provisions of law relating to the retail drug business and pharmacy, and regarding any other matter within its jurisdiction," and to "adopt, amend or repeal rules of professional conduct" (Pet. at p. 2).

FTC v. Texaco, Inc., 555 F.2d 862, 879 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977).

In any event, the fact that the board is authorized to promulgate certain rules and regulations concerning the retail drug business and pharmacy does not necessarily mean that its actions are those of the sovereign. Goldfarb v. Virginia State Light Co., 435 U.S. 389, 410 (1978) ("Goldfarb . . . made it clear that, for purposes of the Parker doctrine, not every act of a state agency is that of the State as sovereign"). The board must show more: it must at least demonstrate that the Commonwealth "clearly intends to displace competition in a particular field with a regulatory structure . . ." Southern Motor Carriers Rate Conference v. U.S., 105 S.Ct. 1721, 1731 (1985).

Because no such showing has been made, state action immunity provides the board no basis to object to the subject subpoenas.

III. The Constitutional Challenge

The board further challenges the Commission's authority to issue the subpoenas on the ground that "[i]n initiating the investigation of the Board's regulations preparatory to an action to enforce the antitrust laws of the United States, the Commission has exercised and is purporting to exercise executive powers in violation of the express terms of the United States Constitution, and the principle of the separation of powers implicit therein" (Pet. at p. 7).

The board apparently contends that those provisions of the FTC Act that

authorize the Commission to conduct anti-trust law enforcement investigations, see, e.g., 15 U.S.C. §§ 46 and 49, are facially unconstitutional because the provisions allegedly infringe on the obligation of the President to "take care" that the laws are faithfully enforced. However, members of the board have merely been subpoenaed to appear and to testify. Even assuming it is not premature for them to raise their constitutional challenge in a petition to quash investigative process, the board's constitutional argument is foreclosed by Humphrey's Executor v. United States, 295 U.S. 602 (1935).

IV. The Requested Stay Pending Final Disposition of In the Matter of Massachusetts Board of Registration in Optometry, FTC No. 9195

Finally, the board argues that one of its sister agencies, the Massachusetts Board of Registration in Optometry, is the respondent in an administrative proceeding brought by the Commission. In that action, the Board of Registration in Optometry has allegedly asserted that the Commission lacks jurisdiction to investigate or take actions against its regulatory activities. Thus, pending a decision there by the Administrative Law Judge, the board requests that the subpoenas be quashed, and that further use of compulsory process be stayed.

The fact that similar issues may be contested in a different administrative proceeding provides no basis for either

quashing the subpoenas here or staying further use of compulsory process. The proceedings are separae and independent. Beyond that, by Initial Decision dated June 20, 1986, Administrative Law Judge Timony rejected the jurisdictional arguments raised by respondent in the Massachusetts Board of Registration in Optometry matter. See Initial Decision at pp. 43-47.

V. Conclusion

For the foregoing reasons, the petition to quash subpoenas of Charles F. Monahan, et al. is denied. Petitioners are directed to comply with the subpoenas on or before July 31, 1986.

Pursuant to Rule 2.7(f), within three days after service of this ruling, petitioners may file with the Secretary of

this Commission a request that the full Commission review the ruling. Commission Rule of Practice 4.4(b) provides that a document shall be deemed filed when it is received by the Office of the Secretary. See 16 C.F.R. 4.4(b) (1986). The timely filing of such a request shall not stay the return date of this ruling, unless the Commission otherwise specifies.

By direction of the Commission.

/s/
Emily H. Rock
Secretary

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF THE SECRETARY June 30, 1986

William L. Pardee, Esq.
Assistant Attorney General
Government Bureau
One Ashburton Place, Room 2019
Boston, MA 02108

Re: In the Matter of Investigation of the Massachusetts Board of Registration in Pharmacy; File No. 851-0145

Dear Mr. Pardee:

The Commission has considered the Request for Stay Pending Review and Requ st for Review that you filed on behalf of your clients, Charles F. Monahan, et al., in the above-captioned matter on July 21, 1986.

The Commission has determined that the Request for Review to the full Commission does not raise any new or different issues regarding the requested quashing of the subpoenas, and that the peti-

tion was properly denied for the reasons stated in the July 15, 1986 letter ruling. Accordingly, the full Commission concurs with and hereby adopts that letter ruling in this matter.

In addition, the Commission denies the request for a stay of the July 31, 1986 return date now set for response to the subpoenas.

For the foregoing reasons, the Request for Review is denied and petitioners are directed to comply with the July 15, 1986 letter ruling on the petition at the time and place specified therein.

By the Commission.

/s/
Bejamin I. Berman
Acting Secretary

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1392

FEDERAL TRADE COMMISSION,
Petitioner, Appellee,

v.

CHARLES F. MONAHAN, ET AL.,
Respondents, Appellants.

JUDGMENT

Entered: November 4, 1987

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FEDERAL TRADE COMMISSION Petitioner, v. MR. CHARLES F. MONAHAN, et al., Respondents	No. MBD 86-348

Petition For an Order Requiring Respondents To Appear And Testify In An Investigation Being Conducted By The Federal Trade Commission

Petitioner, the Federal Trade Commission (the "FTC" or "Commission"), by its undersigned attorneys and pursuant to Sections 6 and 9 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 46 and 49 petitions this Court for an order requiring the nine respondents to appear and to testify in accordance with the subpoenas ad testificandum issued by

petitioner on May 15, 1986, in the course of a law enforcement investigation being conducted by the FTC (FTC File No. 851-0145). Petitioner further alleges the following:

1. Petitioner is an administrative agency of the United States government organized and existing pursuant to the FTC Act, 15 U.S.C. § 41 et seq. The Commission is authorized and directed by Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, to prohibit unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.

2. The Commission is empowered by Section 3 of the FTC Act, 15 U.S.C. § 43, to prosecute any inquiry necessary to its duties in any part of the United States and by Section 6 of the FTC Act

to conduct investigations and to gather and compile facts. Section 9 of the FTC Act further emplowers the FTC, inter alia, to compel by subpoena the production of documents and the attendance and testimony of witnesses relating to its inquiries. Such production of documentary evidence and testimony may be required from any place in the United States at any designated place of hearing.

3. Respondent, Charles F. Monahan, is the Executive Secretary of the Massachusetts Board of Registration in Pharmacy (the Board), which has its offices at the Leverett Saltonstall Building, 15th Floor, 100 Cambridge Street, Boston, Massachusetts, in this judicial district.

4. Respondents, Richard Dudley, Jeffrey Ross, Chester Babuneau, Eileen

Dumouchel, Anthony Lamonica, Morris Lederman, and John Stallworth, are members of the Board.

5. Respondent, Romulus L. DeNicola, is a former Executive Secretary and former member of the Board.

6. The Board is an agency created and operating under Chapter 13, §§ 22-25 of the General Laws of the State of Massachusetts. The Board, by statute, consists of seven members appointed by the State Governor, six of whom must be registered pharmacists, and one of whom is a representative of the public. Id (Sect. 22).

7. Jurisdiction over this cause, and over the respondents and the power to enforce the FTC's subpoenas and to issue the order here prayed for, is conferred upon this Court by Section 9 of the FTC Act, 15 U.S.C. § 49, which pro-

vides that any District Court of the United States within the jurisdiction of which an inquiry is conducted by the FTC may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership or corporation, issue an order requiring such person, partnership or corporation to appear before the FTC, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question.

8. The investigation, in the course of which the FTC's subpoenas were issued and served, is being conducted, inter alia, in this distrct.

9. By letter dated August 14, 1985 (Exh. A), FTC antitrust attorneys sought the Board's voluntary cooperation in an investigation of whether certain specific regulations adopted by the Board constituted unfair methods of competition in

violation of Section 5 of the FTC Act. The Commission is conducting similar inquiries in a number of other states.

10. On November 4, 1985, the FTC, by formal vote, issued a resolution (Exh. B) authorizing the use of compulsory process in state pharmacy board investigations, which resolution described the purpose and scope of the inquiries.

11. After initially providing some documents, the Board refused all further cooperation. By letter dated December 11, 1985 (Exh. C), the Board's counsel notified the Commission that the Board would not voluntarily allow the FTC to conduct interviews with members of the Board or with the Board's administrative staff.

12. In view of the Board's refusal to cooperate voluntarily, FTC staff

sought the issuance of nine testimonial subpoenas directed to the members of the Board, and to its current and former Executive Secretaries, which were signed by Commissioner Mary L. Azcuenaga on May 15, 1986 (Exh. D).

13. On June 12, 1986, the respondents filed a petition to quash the subpoenas pursuant to Section 2.7(d) of the FTC's Rules of Practice and Procedure, 16 C.F.R. § 2.7(d) ("FTC Rule 2.7(d)") (Exh. E). The Board argued that state regulatory agencies are totally immune from federal antitrust investigation and that the exercise of prosecutorial functions by the FTC violates the Constitution. They further asked that the Commission stay the requirement to appear and testify pending a ruling by the Administrative Law Judge ("ALJ"), in an adjudicative proceeding then pending

before the FTC. In the Matter of Massachusetts Board of Registration in Optometry, FTC Docket No. 9195 ("Mass. Optometry").

14. On July 15, 1985, FTC Commissioner Terry Calvani, acting pursuant to authority delegated under FTC Rule 2.7(d)(4), denied the respondent's petition to quash (Exh. F). In rejecting the Board's claims that it is totally immune from investigation by federal antitrust authorities, Commissioner Calvani noted both the settled rule that substantive defenses to administrative charges are prematurely raised in response to an administrative subpoena. He also based his rulings on the complete lack of legal support for the argument that any entity of state government with regulatory authority is automatically exempt from federal antitrust investi-

gation. Commissioner Calvani also rejected the respondents' constitutional argument, noting that it was foreclosed by the Supreme Court's decision in Humphrey's Executor v. United States, 295 U.S. 602 (1935). Finally, he rejected the respondents' request that the investigation be suspended pending the resolution of the Mass. Optometry adjudication both because the proceedings were separate and independent and because the ALJ had decided the case and rejected the jurisdictional issues raised by the Mass. Optometry respondent.*/

15. Pursuant to FTC Rule 2.7(f), the respondents filed an appeal of Commissioner Calvani's ruling to the full

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*/ The ALJ's opinion, as yet unpublished, is Attachment 1 hereto.

Commission on July 21, 1986 (Exh. G). Respondents requested that the Commission suspend the pharmacy investigation indefinitely until the respondent in the separate Mass. Optometry adjudication had exhausted all avenues of administrative and appellate review.

16. While this appeal was pending, counsel for the respondents advised the Commission that in no event would the respondents comply with the subpoenas (Exh. H).

17. On July 30, 1986, the Commission denied the appeal and directed compliance (Exh. I).

18. This Petition and the exhibits attached hereto are verified by sworn affidavit (Exh. J).

19. No respondent has complied with his or her subpoena.

20. No previous application has been made to this or any other court for the relief prayed for herein.

WHEREFORE, the Commission respectfully invokes the aid of this court, and prays:

(1) That the Court issue an order directing each respondent to show cause why each respondent should not comply with and obey the subpoena;

(2) That the Court enter an order directing each respondent to appear and testify; and

(3) That petitioner be given such other and further relief as the Court may determine to be just and proper.

Respectfully submitted,

ROBERT D. PAUL
General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel

FREDERICK E. DOOLEY, JR.
Attorney

Attorneys for Petitioner
Federal Trade Commission
Sixth St. and Pennsylvania Ave.,
Washington, D.C. 20580
(202) 523-3619; (202) 326-2443

[Exhibits C, D, E, F, G, H, I
to the Petition omitted]

Exhibit A to the Petition

BUREAU OF COMPETITION
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

August 14, 1985

Mr. Richard Dudley
President
Massachusetts Board of Registration
in Pharmacy
Leverett Saltonstall Building
15th Floor
100 Cambridge Street
Boston, Massachusetts 02202

Re: Massachusetts Board of Registration in Pharmacy
File No. 851 0145

Dear Mr. Dudley:

The Bureau of Competition of the Federal Trade Commission is conducting a nonpublic preliminary investigation to determine whether the regulations promulgated by the Massachusetts Board of Registration in Pharmacy ("the Board"), Mass. Admin. Code tit. 247, §§7.00(7), (14), and (26), may unreasonably restrain competition and injure consumers in vio-

lation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45.

The purpose of this letter is to ask for your cooperation in this preliminary inquiry, and to request that you voluntarily submit the documents described below and make available for interview appropriate members of the Board and its staff. This is not a subpoena. We wish to emphasize that neither this inquiry letter nor the existence of this nonpublic investigation should be viewed as an accusation by the Federal Trade Commission or its staff of any wrongdoing by the Board or any of its members.

The first regulation, Mass. Admin. Code tit. 247, §7.00 (7), prohibits claims of professional superiority, and

advertising of services that disparages the ability, character or integrity of other pharmacists. This regulation may unjustifiably prevent pharmacies from communicating effectively to the public truthful information about the services they offer. A rule prohibiting claims of superiority clearly lessens rivalry among competing sellers, and the severity of this effect will depend on the extent to which the rule prevents the communication of truthful information. At a minimum, a prohibition on advertisements that contain claims of superiority restricts comparative advertising, which can be a highly effective means of informing and attracting customers and an important competitive force. When a seller cannot compare the attributes of its services to those of its competitors, the incen-

tive to improve or to offer different products, services, or prices is likely to be reduced. The Board, of course, has a legitimate interest in preventing false, deceptive, or misleading advertising by pharmacies. Nonetheless, restraints on advertising by professional boards should not exceed what is reasonably necessary to prevent advertising through a form or method that is shown, in fact, to have been deceptive. See In re R.M.J., 455 U.S. 191, 202 (1982).

The second regulation, Mass. Admin. Code tit. 247, §7.00(14), prohibits mail order business and any arrangement "that adversely affects the pharmacist-patient-practitioner relationship." The third regulation, Mass. Admin. Code tit. 247, §7.00 (26), prohibits any arrangement whereby prescriptions may be collected,

delivered in batch to a pharmacy, and filled. These rules prohibit the operation of mail order pharmacies and branch office facilities often referred to as "pick-up stations" or "depots". These regulations may limit the ability of pharmacy firms to provide pharmacy services more efficiently by better utilizing pharmacist time, reducing inventory and space costs, and expanding the market areas they serve. Such arrangements may reduce costs and provide increased convenience for consumers. On the other hand, some pharmacists have suggested that the use of mail order pharmacies and pick-up stations may raise concerns about service quality and the security of prescription drugs, and we would be most interested in learning from the Board about these or any other considera-

tions that might justify the restriction on the operation of such facilities or arrangement.

The Supreme Court has affirmed that imposition of unreasonable restraints on competition among professionals can violate the antitrust laws. E.g., National Society of Professonal Engineers v. United States, 435 U.S. 679 (1978). In particular, restraints on truthful advertising imposed and enforced by competing professionals can violate the antitrust laws. American Medical Association, 94 F.T.C. 701 (1979), aff'd 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982). Moreover, absent "state action" immunity, the prohibition under the antitrust laws of agreements in restraint of trade en-

compasses regulatory activity by state professional boards. See United States v. Texas State Board of Public Accountancy, 464 F. Supp. 400 (W.D. Tex. 1978), aff'd mem., 592 F.2d 9191 (5th Cir.), cert. denied, 444 U.S. 925 (1979).

Please submit the following documents[1]:

> All documents referring or relating to any of the Regulations[2] or to any predecessor of any of the Regulations, the advertising of professional superiority, mail order pharmacies, or arrangements for collecting prescriptions at locations that are not licensed

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1/ "Documents" means all originals, and non-identical copies, of all information and communications of any kind, whether handwritten, typewritten, printed, taped, or in any other way recorded, wherever located, in the possession or subject to the control of the Board or any of its members.

2/ "Regulations" means Mass. Admin. Code tit. 247, §7.00 (7), (14), and (26).

> as pharmacies, including, but not limited to, minutes or transcripts of meetings or hearings; correspondence; reports, memoranda, or studies; records of formal or informal disciplinary proceedings; and records of formal, informal, or advisory statements, opinions, or advice.

Because we do not know how long the Regulations or any precedessors have been in effect, we are unable at this time to limit the document request to a specific time period. If you believe that any aspect of this request is unduly burdensome, or if you have any questions about it, please let me know as soon as possible. We would consider accepting access to the Board's records, with the right to copy relevant materials, in lieu of document production, if that would be more convenient for the Board. In addition, please feel free to submit any

additional information that you may wish to bring to our attention with respect to the purpose for the Board's restrictions.

Please submit the responsive documents within twenty-one (21) days of this request. You may submit legible photocopies in lieu of original documents. The documents should be sent to N. Scott Sacks, Bureau of Competition, Federal Trade Commission, Suite 841, 600 E Street, N.W., Washington, D.C. 20580.

Under the Federal Trade Commission's Rules of Practice, confidential treatment will be afforded to documents that are submitted voluntarily in lieu of a subpoena. Furthermore, as provided in the FCT Imporvements Act of 1980, all information provided in response to this request will be exempt from disclosure

under the Freedom of Information Act, 5 U.S.C. §552.

We also request the opportunity to interview you and appropriate members of the Board and its staff at mutually convenient times in the Board's offices. We expect the interviews to include the following topics:

-- the procedures of the Board;

-- the origin and history of the Regulations, including the reasons for enacting, amending, and retaining the Regulations;

-- the interpretation of the Regulations and their history of enforcement;

-- the effect of the Regulations on competition in the sale of prescription drugs; and

-- the role of pharmacists and related professional and trade associations in the enactment, amendment, enforcement, and interpretation of the Regulations.

We have tried to make this request reasonably comprehensive without being

unduly burdensome. If you believe that any aspect of this request is unduly burdensome, or if you have any questions about it, please let me know as soon as possible. At the same time, this request should not be considered to be necessarily all-inclusive. As in any investigation, it is possible that we will find it necessary to seek access to additional records or pursue additional lines of inquiry.

If you have any questions concernig this matter, please contact me at (202) 724-1273

Sincerely,

/s/
N. Scott Sacks
Attorney

Exhibit B to the Petition

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Terry Calvani,
Acting Chairman
Patricia P. Bailey
Mary L. Azcuenaga

RESOLUTION DIRECTING USE OF
COMPULSORY PROCESS IN A
NONPUBLIC INVESTIGATION OF UNNAMED
STATE PHARMACY BOARDS

File No. 861 0016

Nature and Scope of Investigation:

An investigation to determine whether unnamed state boards that regulate the pharmacy profession in any of the United States have engaged or are engaging in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act by placing unreasonable restrictions on advertising or on business practices that offer increased convenience to consumers, such as branch offices and computerized

prescription systems.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation for a period not to exceed two years from the date of issuance of this resolution.

Authority to Condct Investigation:

Sections 6,9, and 10 of the Federal Trade Commission Act, 15 U.S.C. §§46, 49, and 50, as amended; FTC Procedures and Rules of Practice, 16 C.F.R. §1.1 et seq., and supplements thereto.

By direction of the Commission.

/s/
Emily H. Rock
Secretary

ISSUED: November 4, 1985

Exhibit J to the Petition

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FEDERAL TRADE COMMISSION	)	
Petitioner,	)	No.
v.	)	
CHARLES F. MONAN, et al.,	)	
Respondents.	)	

AFFIDAVIT OF N. SCOTT SACKS

Washington, D.C.)
)
)

N. Scott Sacks, Esquire, being of lawful age, first being duly sworn, deposes and says:

1. That he is an attorney with the Bureau of Competition of the Federal Trade Commission ("FTC") and is assigned as supervising attorney to the FTC investigation entitled Massachusetts Board of

Registration in Pharmacy, FTC File No. 851 0145, and is authorized to execute this affidavit and to verify the contents of the foregoing petition for an order requiring the named respondents to appear and testify in this FTC law enforcement investigation;

2. That enforcement of the subpoenas is critical to the completion of the FTC's investigation. The documents submitted voluntarily by the Massachusetts Board of Registration in Pharmacy ("Board") in response to the staff's August 14, 1985 request for documents (Exh. A) do not identify or discuss the justifications, if any, that may exist to support the regulations that are the subject of the investigation, nor do they contain sufficient information with respect to the interpretation and enforcement of the regulations. Such informa-

tion is necessary for a thorough analysis of the restraints at issue in order that the Commission can make an informed decision as to whether issuance of a complaint would be in the public interest. The enforcement of compulsory process against respondents, who are present or past members of the Board or its staff, is necessary in order to obtain this relevant testimony, given that the Board has refused to make its members and staff available on a voluntary basis;

3. That he has read the contents of the foregoing petition and the exhibits attached thereto; and

4. That the statement of facts contained in the foregoing petition is true and correct to the best of his knowledge and that the exhibits attached to the

petition are true and accurate copies of official FTC records.

/s/
N. Scott Sacks

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FEDERAL TRADE COMMISSION,	)	
Petitioner	)	
v.	)	MBD No. 86-848-Y
CHARLES F. MONAHAN, et al.,	)	
Respondents	)	

REPLY FOR THE RESPONDENTS

I.

1. The respondents, who are the members of the Massachusetts State Board of Registration in Pharmacy (the State Board), and the State Board's present and past executive secretaries, oppose the petition and respectfully pray the Court to deny enforcement of the petitioner's subpoenas ad testificandum. Enforcement should be denied because the subpeonas were issued in aid of an investigation which is wholly beyond the peti-

tioner's authority, since the State Board is immune to the laws enforced by the petitioner. Enforcement should also be denied because the petitioner's investigation constitutes or involves the exercise of executive power, which may not constitutionally be delegated to the petitioner. Alternatively, enforcement should be denied at this time for the reasons set forth hereinafter.

2. The respondents generally admit the factual allegations in the petition, but deny that the petitioner is authorized to conduct this investigation of the State Board and its regulations. The respondents dispute the characterizations of their arguments as well as the legal conclusions set forth in paragraph 14 of the petition. Further replying, the respondents say the following:

II.

3. The State Board is an agency of the Commonwealth of Massachusetts, constituted pursuant to chapter 13, §§ 22-25 of the General Laws of Massachusetts and mandated to regulate the business and profession of pharmacy, as more fully set forth in chapter 94C and chapter 112, §§ 34-42A of the General Laws. Pursuant to chapter 112, § 42A, of the General Laws, the State Board is authorized and empowered to "make such rules and regulations as it deems necessary to enable it to properly enforce the provisions of law relating to the retail drug business and pharmacy and regarding any other matter within its jurisdiction," and to "adopt, amend or repeal rules of professional conduct." Pursuant to Chapter

94C, § 6, of the General Laws, the State Board is authorized and empowered to "promulgate rules and regulations relative to registration and control of the manufacture, dispensing and possession of controlled substances within the Commonwealth." A copy of the provisions of the General Laws administered by or pertaining to the State Board is attached hereto.

4. Under the decisions of the Supreme Judicial Court, a grant of regulatory autority over a profession of a breadth comparable to the power granted the State Board amounts to a grant of "primary responsiblity in the regulation of the practice" of that profession. See Levy v. Board of Registration and Discipline in Medicine, 378 Mass. 519, 524, 392 N.E. 2d 1036, 1039 (1979). An

agency with such authority is not constrained by the specific words of its constitutive act, but rather is authorized to promulgate any rule, substantive or procedural, which is rationally related to its statutory mission and not inconsistent with the statutes. Id. It is well settled as matter of state law, for instance, that the professional licensing boards may promulgate rules designed to promote professionalism even if there is some adverse effect upon competition. See Blue Hills Cemetary, Inc. v. Board of Registration in Embalming and Funeral Directing, 379 Mass. 368, 374, 398 N.E. 2d 471, 476 (1979); Silverman v. Board of Registration in Optometry, 344 Mass. 129, 133-35, 181 N.E. 2d 540, 541-3 (1962) (upholding regulation forbidding optometrists from opening

offices on the premises of commercial or mercantile establishments). See also Raymond v. Board of Registration in Medicine, 387 Mass. 708, 713, 443 N.E. 2d 391, 394 (1982) (Medicine State Board "has the authority to protect the image of the profession" and may discipline physicians "for lack of good moral character, and for conduct that undermines public confidence in the integrity of the profession"). And, where an agency such as the State Board acts within its realm of responsibility, its action is as much the sovereign action of the state as is the legislation under which it operates. See, e.g., Borden, Inc. v. Commissioner of Public Health, 388 Mass. 707, 723, 448 N.E. 2d 367, 378 (1983) ("[A] properly promulgated regulation has the force of law . . . and must be

accorded all the deference due to a statute."). Accordingly, the State Board's regulations are immune from scrutiny under the antitrust and unfair competition laws.

5. As previously stated, the State Board is authorized by G.L. c. 112, § 42A, to promulgate rules of professional conduct. The State Board has adopted a Code of Professional Conduct. A copy of the Code, as in effect prior to November 4, 1986, is attached hereto. The petitioner is investigating rules 7, 14, and 26 of the Code.

6. Rule 7, as in effect prior to November 4, 1986, prohibited pharmacists from claiming professional superiority, or disparaging the ability, character or integrity of other pharmacists, in adver-

tisements. Rule 7 was superseded on November 4, 1986. See Part IV, infra.

7. Rule 14 prohibited pharmacists from participating in any mail order business or entering any plan, agreement or arrangement that would adversely affect the pharmacist-patient-practitioner relationship. A proposal to amend Rule 14 is under consideration by the Board. See Part IV infra.

8. Rule 26, as then in effect, prohibited pharamcies in most cases from collecting or dispensing prescriptions in batches at drop-off locations. Rule 26 was superseded on November 4, 1986. See Part IV, infra.

9. In other provisions of chapter 112 of the General Laws, the Legislature has explicitly prohibited claims of professional superiority in advertising, and with respect to the regulation of

podiatrists has defined such advertising to constitute "unprofessional conduct." G.L. c. 112, § 19. See G.L. c. 112, § 52A (prohibiting dentists from claiming professional superiority). Therefore, in generally authorizing the Pharmacy State Board to promulgate rules of professional conduct, the Legislature intended the State Board to promulgate a rule like Rule 7, if it saw fit.

10. Pursuant to G.L. C. 112, § 30, only registered pharmacists, persons acting under their direction and supervision, and practitioners within the meaning of G.L. c. 94C may dispense controlled substances. Pursuant to G.L. c. 94C, § 3, all prescription drugs are controlled substances. Pursuant to G.L. c. 94C, § 1, "dispense" means "to deliver a controlled substance to an ultimate user . . . or to the agent of an ultimater

user . . . ." Therefore, in authorizing the State Board to regulate distribution, dispensing, and possession of controlled substances in the commonwealth, the Legislature clearly authorized the promulgation of Rule 14, prohibiting mail order pharmacy.

11. Pursuant to G.L. c. 112, § 30, a pharmacist may only dispense controlled substances when acting in the course of his employment in a pharmacy. Pursuant to G.L. c. 94C, § 1, and G.L. c. 112, § 39, a pharmacy is a facility licnsed to dispense controlled substances, and under the direction or supervision of a registered pharmacist. Pursuant to G.L. c. 94C, § 10, and G.L. c. 112, § 38, each store for the transaction of the retail drug business and each pharmacy must be separately licensed. Therefore, in

authorizing the State Board to regulate the distribution, dispensing, and possession of controlled substances, the Legislature clearly authorized the promulgation of Rule 26, prohibiting the conduct of pharmacy business in unlicensed drop-off centers not under the direction and supervision of a registered pharmacist.

III.

12. The petitioner is constituted by 15 U.S.C. § 41, and is composed of five commissioners appointed by the President for seven-year terms, and removable only for inefficiency, neglect of duty, or malfeasance in office. The petitioner thus is substantially free from the direction and control of the President, and so is not properly characterized as an agency within the Executive.

13. The Constitution of the United States expressly vests the power and responsibility to "take Care that the Laws be faithfully executed" in the President and no other person, body, or branch of the federal government. Furthermore, the Constitution forbids the combination of legislative, executive, and judicial powers, but requires a separation of such powers. The Constitution does not permit or empower the Congress to grant power to execute or enforce the laws of the United States to any person, body or agency not subject to the ongoing supervision and control of the President.

14. In initiating the investigation of the State Board's regulations preparatory to an action to enforce the antitrust or unfair competition laws of the United States, the Commission has exer-

cised and is purporting to exercise executive powers in violation of the express terms of the United States Constitution, and of the principle of the separation of powers implicit therein.

IV.

15. The Pharmacy Board in December, 1985, declined to cooperate further with the petitioner as the result of the position taken by the petitioner in reference to its sister state agency the Optometry Board. As is detailed in the Affidavit of Thomas Barnico, filed herewith, in the course of the petitioner's investigation of regulations of the Massachusetts State Board of Registration in Optometry, that State Board repealed three of four regulations deemed objectionable by the petitioner, upon the recommendation of

state officials. Even so, the petitioner insisted upon a full evidentiary hearing and an order purporting to enjoin enforcement of the repealed regulations, to require the State Board to advise registrants of the order, and to file regular reports with the petitioner concerning the State Board's performance of its duties. The petitioner argued that since the Optometry regulations were repealed during the pendency of the investigation, the Optometry Board could not be trusted not to repromulgate them absent an order.

16. At no time in the course of its investigation has the petitioner proposed to the Pharmacy Board that it amend its regulations, as the petitioner may do pursuant to G.L. c. 30A, § 4. In September, 1986, in response to a proposal by

the Secretary of the Commonwealth's Executive Office of Consumer Affairs, the State Board proposed amendments to two of the three regulations under investigation. The amendments were adopted on November 4, 1986, after hearing pursuant to G.L. c. 30A, § 2.

17. Further, in response to additional comments by the Secretary, the State Board took under advisement a proposal to change the third regulation under investigation by the petitioner. These matters are detailed in an Affidavit of Charles Monahan filed herewith. The respondents have kept the petitioner fully advised with respect to these events by letter, see Attachments 1 and 2, and by telephone.

18. It appears that the petitioner, which was created in 1914, did not assert

authority to determine the lawfulness of actions of state regulatory agencies until 1984. The Commission has never issued a formal ruling on the question of its authority to investigate and bring enforcement proceedings against such agencies notwithstanding state action immunity.

19. Nevertheless, it appears from the rulings in the Optometry Board case and in this case, that the Commission has finally concluded that it has authority to investigate and enter orders at least against state regulatory boards consisting of members of the regulated group:

a. In the Optometry Board's case, the Board raised the state action defense in a motion to dismiss. The administrative law judge denied the motion on the merits without a hearing, and denied

certification of the question to the full Commission after Complaint Counsel argued that "differences of opinion as to these issues do not appear to exist at the Commission level." The administrative law judge also denied an interlocutory appeal of the question because, he ruled, it "failed to show substantial ground for difference of opinion on the merits of the motion for dismissal." Affidavit of Assistant Attorney General Thomas Barnico ¶ 15 at 4.

b. The respondents likewise timely raised the state action defense in their Petition to Quash Subpoenas, Exhibit E to the petition. Although the respondents set forth in detail their statutory authority, a single commissioner (Terry Calvani) ruled that the State Board had failed to carry what he ruled was its

burden, i.e., to show "that the Commonwealth 'clearly intends to displace competition in a particular field with a regulatory structure . . .'" Order denying Petition to Quash at 2 (July 15, 1986), Exhibit F to Petition for Enforcement.

c. Pursuant to Rule 2.7(f) of the Commission's rules, the respondents sought the review of the full Commission. The respondents set forth in detail their authority under state law to promulgate and enforce the subject regulations, pointed out that the state action immunity is an immunity from federal antitrust scrutiny, and not just immunity from judgments or orders under the antitrust laws, and in the interests of comity requested plenary Commission review of the state action defense (and the separation of powers question) in advance of the

intrusive and burdensome process followed in the Optometry Board's case. In the alternative, if the full Commission was disinclined to decide the question in advance, the respondents requested that the Commission at least stay proceedings pending a final decision on the state action defense of the respondents' sister state agency. Request for Review (July 18, 1986), Exhibit G to Petition for Enforcement.

d. On June 30, 1986, the full Commission denied the Request for Review because, it ruled, the Request "does not raise any new or different issues regarding the requested quashing of the subpoenas, and . . . the petition was properly denied for the reasons stated in the July 15, 1986 letter ruling." Order denying Request for Review (July 30,

1986), Exhibit I to Petition for Enforcement.

20. The arguments presented by the respondents are purely arguments of law, as there is no factual dispute concerning the status of the State Board as an agency of the Commonwealth, or concerning the nature or scope of the State Board's authority. If the Court declines to review the respondents' arguments now, they will be subjected to substantial, burdensome and oppressive discovery and trial, as demonstrated by the Optometry Board case. The petitioner has not shown that the public interest requires that the investigation move forward immediately, even before decision of the Optometry Board's case. Any exigency that may have existed has been alleviated by the amendments of the Pharmacy Board's regulations.

In consideration of the foregoing, the respondents respectfully request that the Court deny enforcement of the subpoenas at least until the final disposition of the petitioner's proceedings (including any appeal thereof) against the State Board of Registration in Optometry.

In support of their position, respondents refer the Court to their memorandum filed herewith.

By their attorneys,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

/s/

William L. Pardee
Assistant Attorney General
Government Bureau
One Ashburton Place, Room 2019
Boston, Massachusetts 02108-1698
(617) 727-1039

Date: November 19, 1986

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FEDERAL TRADE COMMISSION, Plaintiff, v. CHARLES F. MONAHAN, et al., Defendants.	)	MBD No. 86-848-Y

AFFIDAVIT OF THOMAS A. BARNICO

I, Thomas A. Barnico, Assistant Attorney General of Massachusetts, under oath depose as follows.

1. I am counsel of record for the Massachusetts Board of Registration in Optometry (the optometry board) in an adjudicatory proceeding pending before the Federal Trade Commission, In the Matter of Massachusetts Board of Registration in Optometry, FTC Docket No. 9195.

2. The optometry board exists and transacts public business under Massachusetts General Laws (G.L.) c. 13, § 16, and c. 112, §§ 66-73B. Massachusetts law requires that the Governor appoint practicing optometrists to four of the five seats on the optometry board. G.L. c. 13, § 16.

3. The July 7, 1985, complaint in FTC Docket No. 9195 challenged certain past and current regulations of the board concerning advertising by optometrists. Ex. "A" attached.

4. On July 31, 1985, I met with counsel for the FTC and suggested that in light of rulemaking proceedings pending before the board which would eliminate three of the four regulations challenged in the complaint, the FTC's action should be dismissed as to those regulations, or at least discovery stayed. I

was told by FTC complaint counsel that the prospective repeal of the three board regulations would be "irrelevant" to pursuit of FTC's case against the otpometry board.

5. On September 11, 1985, the board moved to stay the FTC proceedings pending board action on proposed regulations which would repeal three of the four regulations challenged in the complaint.

6. On September 13, 1985, FTC complaint counsel argued that "the Commission intended that this litigation move forward even though the Board may have begun to take some steps to eliminate anticompetitive restrictions." Opposition to Respondent's Motion to Stay Discovery at 2 (September 13, 1985).

7. On September 17, 1985, the FTC Administrative Law Judge (ALJ) denied the optometry board's motion to stay proceedings.

8. On October 31, 1985, the optometry board moved to dismiss the complaint on the ground that its regulations and enforcement actions were "state action" and therefore exempt from the FTC Act.

9. FTC complaint counsel opposed, and the ALJ denied, the optometry board's request for oral argument on the questions presented by the motion.

10. On November 7, 1985, the optometry board repealed three of the four regulations challenged in the complaint. Ex. B.

11. On November 8, 1985, FTC complaint counsel opposed the board's request for certification of the "state

action" question to the Commission on the ground that "differences of opinion as to these issues do not appear to exist at the Commission level."

12. On November 19, 1985, the ALJ denied the board's motion to dismiss.

13. Also on November 19, 1985, the ALJ denied, without explanation, the optometry board's request that its motion to dismiss be certified to the Commission and further proceedings stayed.

14. On December 2, 1985, the optometry board moved for an interlocutory appeal to the Commission and a stay of proceddings on the ground that its motion to dismiss presented "a controlling question of law as to the jurisdiction of the Federal Trade Commission over sovereign states and their agencies."

15. On December 4, 1985, the ALJ denied the optometry board's motion for an interlocutory appeal because it had "failed to show substantial ground for difference of opinion on the merits of the motion for dismissal." As authority for that ruling the ALJ cited a similar order by an ALJ denying an interlocutory appeal in Rhode Island Board of Accountancy in FTC Docket No. 9181. The Rhode Island case ended in a consent judgment.

16. The discovery which followed the denial of the optometry board's motion to dismiss included the oral deposition of six current and former board members and three board investigators.

17. During the depositions of current and former Board members, FTC complaint counsel asked numerous questions

probing the mental processes of the members, including questions which sought explanations of the reasons for the promulgation of the regulations, and questions seeking the opinions of the members with regard to optometric advertising, professional ethics, competition and the public interest.

18. A ten-day trial before the ALJ took place in February, 1986.

19. In June, 1986, the ALJ issued his decision. The decision held that the optometry board's past and current regulations and related enforcement efforts constituted "unreasonable restraints of trade" which violated the Sherman and Federal Trade Commission Acts. A copy of the ALJ's decision appears as "Attachment 1" to the Commission's Petition in this Court.

20. On July 10, 1986, the optometry board appealed the decision of the ALJ to the Commission. Oral argument on the optometry board's appeal is scheduled for December 2, 1986.

21. The questions presented in the Board of Optometry's appeal are as follows:

(1) Whether state regulations and enforcement actions can "violate" the FTC Act absent a showing that the antitrust laws preempt those actions;

(2) whether the regulations and enforcement actions of a regulatory agency of state government can be and were correctly held to be the product of a "combination or conspiracy" proscribed by the Sherman and FTC Acts;

(3) whether the regulations and enforcement actions of a regulatory agency of state government are "state action" and therefore immune from the antitrust laws;

(4) whether the repeal of state regulations which has the effect of changing state law moots all of complaint counsel's claims and requests for relief based thereon;

(5) if the regulations of a state agency are conceded not to be preempted by the FTC Act, what showing must the state agency make under the Act to uphold the reasonableness of its regulations and related enforcement activity?

(6) whether the enforcement of regulations of a state agency were properly enjoined under the antitrust rule of reason on the ground that they are an overbroad suppression of commercial speech.

Signed under the pains and penalties of perjury, this 18th day of November, 1986.

/s/
Thomas A. Barnico
Assistant Attorney General

/s/
Cathryn Ann Riley
NOTARY PUBLIC

My commission expires:
5/30/91

Dated: November 18, 1986

[Exhibits to the Affidavit Omitted]

§ 1. Trusts, etc., in restraint of trade ilegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one millior dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 . . ., and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7

U.S.C. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. § 227(a)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

* * *

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partner-

ship, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the of-

fice of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United

States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty

days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of

the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

* * *

§ 46. Additional powers of Commission

The Commission shall also have power --

(a) Investigation of persons, partnerships, or corporations

To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan

institutions described in section 57a(f)(3) of this title, and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

§ 49. Documentary evidence; depositions; witnesses

For the purposes of sections 41 to 46 and 47 to 58 of this title the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter

under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a

subpoenas issued to any person, partnership, or corporation issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with the provisions of sections 41 to 46 and 47 to 58 of this title or any order of the Commission made in pursuance thereof.

The Commission may order testimony to be taken by deposition in any proceeding or investigation pending under said sections at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in

the courts of the United States and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

MASSACHUSETTS GENERAL LAWS

Mass. Gen. Laws ch. 13, § 22. Board of Registration in Pharmacy; Appointment, etc.

There shall be a board of registration in pharmacy, in the three following sections called the board, consisting of seven persons, who shall be residents of the commonweath. Five of these persons shall be registered pharmacists and shall have had at least ten consecutive years of practical experience in the compounding and dispensing of physicians' prescriptions, and shall actually be engaged in the drug business. At the time of appointment to the board, one, but not more than one of said five persons shall be in the employ of a retail drug organization operating ten or more registered retail drug stores under the provisions of section thirty-nine of chapter one

hundred and twelve. One person shall be a registered pharmcist and shall have had at least ten years of experience in the compounding and dispensing of physicians' prescriptions, and shall actually be engaged as a pharmacist in a public, non-profit hospital in the commonwealth. One member shall be a representative of the public, subject to the provisions of section nine B. No more than one member shall reside in the same senatorial district. One member shall annually in November be appointed by the governor, for five years from December first following.

Mass. Gen. Laws ch. 94C

§ 1. Definitions.

* * *

"Administer", the direct application of a controlled substance whether by

injection, inhalation, ingestion, or any other means to the body of a patient or research subject by--

(a) A practitioner, or

(b) a nurse at the direction of a practitioner in the course of his professional practice, or

(c) an ultimate user or research subject at the direction of a practitioner in the course of his professional practice.

* * *

"Controlled substance", a drug, substance, or immediate precursor in any schedule or class referred to in this chapter.

* * *

"Dispense", to deliver a controlled substance to an ultimate user or research subject or to the agent of an ultimate user or research subject by a practi-

tioner or pursuant to the order of a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary for such delivery.

"Distribute", to deliver other than by administering or dispensing a controlled substance.

* * *

"Pharmacist", any pharmacist registered in the commonwealth to dispense controlled substances, and including any other person authorized to dispense controlled substances under the supervision of a pharmacist registered in the commonwealth.

"Pharmacy", a facility under the direction or supervision of a registered pharmacist which is authorized to dispense controlled substances, including

but not limited to "retail drug business" as defined below.

* * *

§ 6. Rules and Regulations.

The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases may promulgate rules and regulations relative to registration and control of the manufacture, distribution, dispensing and possession of controlled substances within the commonwealth.

* * *

§ 10. Separate Registration Required for Each Principal Place of Business or Practice, etc.

A separate registration shall be required at each principal place of business or professional practice where the

registrant manufactures, distributes, or dispenses controlled substances.

§ 11. Inspection.

The board of registration in pharmacy in the case of a pharmacy and the commissioner in any case may inspect in accordance with his or its rules and regulations the establishment of a registrant or applicant for registration pursuant to the provisions of this chapter.

§ 12. Issuance of Registration; Determination of Public Interest.

(a) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases shall register an applicant to manufacture or distribute controlled substances included

in the schedules established pursuant to section two unless he determines that the issuance of that registration would be inconsistent with the public interest. In determining the public interest, the board of registration in pharmacy in the case of a retail drug store or a wholesale druggist and the commissioner in all other caes shall consider the following factors:

(1) maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific, or industrial channels;

(2) compliance with applicable federal, state and local law;

(3) any conviction of the applicant under any federal and state law relating to any controlled substance;

(4) past experience in the manufacture or distribution of controlled substances, and the existence in the applicant's establishment of effective controls against diversion;

(5) furnishing by the applicant of false or fraudulent material in any application filed under the provisions of this chapter;

(6) suspension or revocation of the applicant's federal registration to manufacture, distribute or dispense controlled substances as authorized by federal law; and

(7) any other factors relevant to and consistent with the public health and safety.

(b) Registration under subsection (a) of this section shall not entitled a registrant to manufacture or distribute controlled substances in Schedules I or

II established pursuant to the provisions of section two except to the extent specified in the registration.

§ 13. Revocation and Suspension of Registration; Grounds, etc.

(a) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases may suspend or revoke a registration to manufacture, distribute, dispense or possess a controlled substance, after a hearing pursuant to the provisions of chapter thirty A upon a finding that the registrant:

(1) has furnished false or fraudulent material information in any application filed under the provisions of this chapter;

(2) has been convicted under any state or federal law of any criminal violation relating to his fitness to be registered under this chapter;

(3) has had his federal registration suspended or revoked to manufacture, distribute, dispense, administer or possess controlled substances; or

(4) is, upon good cause, found to be unfit or unqualified to manufacture, distribute, dispense, or possess any controlled substance.

(b) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases may pursuant to the provisions of this section or section fourteen suspend or revoke any registration issued by him or it for violation of any provision of this chapter.

(c) Whenever the commissioner, the board of registration in pharmacy, or the commissioner of mental health has substantial reason to believe that a registrant has committed a criminal violation of any provision of this chapter, he or it shall promptly report all pertinent facts to the district attorney in the county where the violation is believed to have occurred, or to the attorney general.

(d) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exists.

(e) If the board of registration in pharmacy in the case of a retail drug business or wholesale druggist or the commissioner in all other cases suspends or revokes a registration, all controlled substances which are affected by such suspension or revocation order at the time of suspension or the effective date of the revocation order shall be placed under embargo pursuant to the procedures prescribed in sections one hundred and eighty-nine and one hundred and eighty-nine A of chapter ninety-four. No disposition may be made of substances under such embargo until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application therefor, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court. Upon a revocation order be-

coming final, all controlled substances may be forfeited to the commonwealth under the provisions of section forty-seven.

(f) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases shall promptly notify the bureau of all orders suspending or revoking a registration and all forfeitures of controlled substances.

§ 14. Suspension or Refusal to Renew upon Finding of Imminent Danger to Public Health, etc; Duration.

The board of registration in pharmacy in the case of a retail drug business or wholesale druggist or the commissioner in all other cases may without hearing suspend or refuse to renew any registration if he finds that there is an immi-

nent danger to the public health or safety which warrants this action, provided he promptly affords the registrant an opportunity for a hearing under chapter thirty A. The suspension shall continue in effect until the conclusion of the proceedings including judicial review thereof, unless sooner dissolved by a court of competent jurisdiction, or withdrawn by the board of registration in pharmacy in the case of a retail drug business or wholesale druggist, or withdrawn by the commissioner in any other case.

Mass. Gen. Laws ch. 112

§ 19. "Unprofessional Conduct" Defined.

"Unprofessional conduct", as used in section eighteen, shall include: . . . (d) written or printed statements of a

character tending to claim professional superiority or the performance of professional services in a superior manner; (e) the inclusion of any fraudulent, misleading or deceptive statement in any form of advertising; . . .

§ 24. Examination of Pharmacists for Registration; Certificates; Reciprocity.

A person who desires to do business as a pharmacist shall, upon payment of a fee, as determined annually by the commissioner of administration under the provision of section three B of chapter seven, to the board of registration in pharmacy, herein and in sections twenty-five to forty-two, inclusive, called the board, be entitled to examination; provided, that he shall have been graduated from a school or college of pharmacy ap-

proved by the board. If any such person is found qualified on examination, he shall be registered as a pharmacist, and shall receive a certificate signed by the president and secretary of the board. . . .

§ 27. Hearing on Application and Complaints.

The board shall hear all complaints made to it against any person registered as a pharmacist charging him in his business as a pharmacist with violating any of the rules or regulations of the board or any laws of the commonwealth, and especially the laws relating to the sale of alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and alcohol; or with engaging with, or aiding or abetting another

in the violation of said rules, regulations or laws; or, if he himself is not the owner and actively engaged in such business, with suffering or permitting the use of his name or certificate of registration by others in the conduct of the business of pharmacy. Such complaints shall set out the offence alleged, and be made within six months after the date of the act complained of or within six months after a conviction by a court of competent jurisdiction. The board shall notify the person complained against of the charge against him and of the time and place of the hearing at which he may appear with his witnesses and be heard by counsel. It may summon witnesses and compel their attendance at said hearings. Witnesses shall testify on oath and may be sworn by a member of the board. Three members

of the board shall be a quorum for any such hearing.

§ 28. Effect of Decision.

If the full board sitting at such hearing finds the person guilty, the board may suspend the effect of his certificate of registration as a pharmacist for such term as it fixes. The board may at any time reconsider its action in cases where it has suspended or revoked the license or certificate of registration of a pharmacist, and may change its determination as justice shall require.

§ 29. Suspension.

It may, by a majority vote of all its members, after hearing, suspend the certificate of registration of a registered pharmacist, who, in its judgment,

is a menace to the public by reason of the improper use of intoxicating liquor or drugs.

§ 30. Persons Authorized to Dispense Controlled Substances; Penalty for Violators.

No person shall dispense any controlled substance or any substance intended for hypodermic use except a person registered as a pharmacist or assistant pharmacist under section twenty-four or corresponding provisions of earlier laws who is acting in the course of his employment in a pharmacy, an intern in pharmacy under the direct supervision of a registered pharmacist in accordance with the regulations of the board, and a practitioner in accordance with the provisions of chapter ninety-four C. The terms "controlled substances", "dispense", "practitioner", and "pharmacy",

as used in this section, shall have the same meaning as set forth in section one of said chapter ninety-four C.

Whoever violates any provision of this section shall be punished by imprisonment in a jail or the house of correction for not more than three months, or by a fine of not more than five hundred dollars, or both.

Notwithstanding any provision of this section to the contrary, a person under the direction and supervision of a registered pharmacist may perform those clerical and ministerial supportive services in a pharmacy which do not require the exercise of professional judgment by a registered pharmacist. The board may make such rules and regulations as it deems necessary to define the supportive services which an unregistered person may

perform in a pharmacy. The registered pharmacist shall be responsible for the actions of any supportive personnel under his supervision.

§ 38. Transaction of Retail Drug Business Regulated.

No store shall be kept open for the transaction of the retail drug business, or be advertised or represented as transacting such business, by means of any sign or advertisement containing the words "drug store", "pharmacy", "apothecary", "drug", "drugs", "medicine shop", or any combination of such words, or otherwise, unless it is registered with, and a permit therefor has been issued by, the board as provided in the following section; . . .

§ 39. Registration, Permits, Fees, etc.

The board may, upon application made in such manner and form as it shall determine, register a store for the transaction of the retail drug business, which store shall be independent of and separate from any business or store other than a retail drug store and issue to such person as it deems qualified to conduct such store, a permit to keep it open; provided, however, that the board may deny such registration and refuse to issue such permit if, in its discretion, such store would be inconsistent with or opposed to the best interests of the public health, welfare or safety, but no such registration shall be made or permit issued in the case of a corporation unless it shall appear to the satisfaction of the board that the management of such

drug store or pharmacy is in the hands of a registered pharmacist. . . .

§ 40. Registration and Permit May be Suspended or Revoked, etc.

The board may suspend or revoke any registration made under section thirty-nine or thirty-nine A and any permit issued thereunder for any violation of the law pertaining to the drug business or the sale of alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, or for any violation of the rules and regulations established by the board, or for aiding or abetting in a violation of any such law, rules or regulations; but before such suspension or revocation the board shall give a hearing to the holder of the permit, after due notice to him of the charges against him and of the time

and place of the hearing. Such holder may appear at the hearing with witnesses and be heard by counsel. Witnesses shall testify on oath and any member of the board may administer oaths to them. The board may require the attendance of persons and compel the production of books and documents. Three members of the board shall be a quorum for such a hearing, but no registration or permit shall be suspended or revoked unless upon the affirmative vote of three or more members thereof.

§ 42A. Rules and Regulations; Revocation or Suspension of License, etc.; Hearings; Rules, etc., to Form Part of Application for License, etc.

The board may make such rules and regulations as it deems necessary to enable it to properly enforce the provi-

sions of law relating to the retail drug business and pharmacy, and regarding any other matter within its jurisdiction; provided, that nothing herein shall authorize the board to make a rule or regulation requiring, as a prerequisite to the examination of an applicant under section twenty-four, or to his qualification, that he be the holder of a degree, nor a rule or regulation prohibiting a registered pharmacist connected with and employed by a hospital or clinic from dispensing medicines or drugs to an employee of such hospital or clinic for the use of such employee, his spouse and his children living in the same household with such employee.

The board may by rule or regulation adopt, amend or repeal rules of professional conduct. Every person who holds

a certificate, license, registration or permit to practice pharmacy or engage in the retail drug business in this commonwealth shall be governed and controlled by the rules and regulations of professional conduct adopted by the board. The board may suspend or revoke any certificate, license, registration or permit to practice pharmacy or engage in the retail drug business for any violation of the rules and regulations established hereunder or for aiding or abetting in any violation of such rules or regulations; but before such suspension or revocation, the board shall give a hearing to the holder of the certificate, license, registration or permit, after due notice to him of the charges against him and of the time and place of the hearing. Such holder may appear at the

hearing with witnesses and be heard by counsel. Witnesses shall testify on oath and any member of the board may administer oaths to them. The board may require the attendance of persons and compel the production of books and documents. Three members of the board shall be a quorum for such a hearing, but no certificate, license, registration or permit shall be suspended or revoked unless upon the affirmative vote of three or more members thereof. The rules of professional conduct adopted by the board shall be printed as part of the application blank for permits, licenses, cetificates and registration and for renewals thereof, and every applicant shall subscribe thereto when making an application.

§ 52A. Illegal Advertising.

No registered dentist, person practicing dentristry, or dental hygienist shall include, or permit, or cause to be included, in any newspaper, radio, or television advertisement, or in any display, sign, personal solicitation or other manner or advertising, any written or spoken words or statements of a character tending to deceive or mislead the public, or claiming professional superiority or the performance of professional services in a superior manner, or the performance of painless operations of a dental or oral surgical nature, or shall advertise with signs or printed advertisements, or by means of show cases, containing the representation of a tooth, teeth, dental restoration of any kind or of whatsoever design or description or

any portion of the human head or neck or photograph of any person, or shall make or set forth any promises, guarantees, representations, or statements that satisfaction or a cure will result from the performance of professional services; provided, however, that the foregoing shall not be construed to prevent the publication of truthful advertisements concerning the availability and price of routine dental services by persons subject to this section. . . .

§ 61. Boards of Registration in Medicine, etc., May Suspend, etc., Certificates, etc.

Except as otherwise provided by law, each board of registration or examination in the division of registration of the department of civil service and registration, after a hearing, may, by a majority

vote of the whole board, suspend, revoke or cancel any certificate, registration, license or authority issued by it, if it appears to the board that the holder of such certificate, registration, license or authority, is insane, or is guilty of deceit, malpractice, gross misconduct in the practice of his profession, or of any offence against the laws of the commonwealth relating thereto. Any person whose certificate, registration, license or authority is suspended or revoked hereunder shall also be liable to such other punishment as may be provided by law. The said boards may make such rules and regulations as they deem proper for the filing of charges and the conduct of hearings.

Each such board, if it appears after a hearing that a statement in an applica-

tion to it for certification, registration, licensure or authority, which is required to be under oath or affirmation or to contain or be verified by a written declaration that it is made under penalties of perjury, is false and known to the applicant to be false, shall refuse to grant or issue or shall revoke or cancel such certificate, registration, license or authority. The provisions of this paragraph shall not affect, but shall be in addition to, any other penalty provided by law.

Except as otherwise provided in this chapter, no such board shall make any rule or regulation prohibiting the advertising or dissemination of truthful information concerning the price, nature and availability of goods and services to consumers, the effect of which would restrain trade or lessen competition.

§ 64. Review of Suspension, etc., of Certificate, etc., by Supreme Judicial Court.

The supreme judicial court, upon petition of a person whose certificate, registration, license or authority has been suspended, revoked or cancelled, may enter a decree revising or reversing the decision of the board, in accordance with the standards for review provided in paragraph (8) of section fourteen of chapter thirty A; but prior to the entry of such decree no order shall be made or entered by the court to stay or supersede any suspension, revocation or cancellation of any such certificate, registration, license or authority.